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AMENDED IN SENATE JULY 8, 2013

AMENDED IN ASSEMBLY MAY 24, 2013

AMENDED IN ASSEMBLY APRIL 11, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

## **ASSEMBLY BILL**

**No. 263**

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**Introduced by Assembly Member Roger Hernández**

February 7, 2013

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An act to amend Sections 98.6, 1102.5, and 1103 of, to add Section 1024.6 to, and to add Chapter 3.1 (commencing with Section 1019) to Part 3 of Division 2 of, the Labor Code, relating to employment.

### LEGISLATIVE COUNSEL'S DIGEST

AB 263, as amended, Roger Hernández. Employment: retaliation: immigration-related practices.

Existing law prohibits an employer from discharging an employee or in any manner discriminating against any employee or applicant for employment because the employee or applicant has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights. Existing law provides that an employee who made a bona fide complaint, and was consequently discharged or otherwise suffered an adverse action, is entitled to reinstatement and reimbursement for lost wages. Existing law makes it a misdemeanor for an employer to willfully refuse to reinstate or otherwise restore an employee who is determined by a specified procedure to be eligible for reinstatement.

This bill would also prohibit an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. *The bill would expand the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages.* The bill would provide that an employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages. The bill would subject a person who violates these provisions to a civil penalty of up to \$10,000 per violation. The bill would also provide that it is not necessary to exhaust administrative remedies or procedures in the enforcement of these provisions. Because the willful refusal by an employer to reinstate or reimburse an employee who suffered a retaliatory action under these provisions would be a misdemeanor, the bill would expand the scope of a crime and impose a state-mandated local program.

Existing law declares that an individual who has applied for employment, or who is or has been employed in this state, is entitled to the protections, rights, and remedies available under state law, regardless of his or her immigration status. Existing law declares that an inquiry into a person's immigration status for purposes of enforcing state labor and employment laws shall not be permitted, unless a showing is made, by clear and convincing evidence, that the inquiry is necessary in order to comply with federal immigration law.

This bill would make it unlawful for an employer or any other person to engage in, or direct another person to engage in, an unfair immigration-related practice, as defined, against a person for the purpose of, or with the intent of, retaliating against any person for exercising a right protected under state labor and employment laws or under a local ordinance applicable to employees, as specified. The bill would also create a rebuttable presumption that an adverse action taken within 90 days of the exercising of a protected right is committed for the purpose of, or with the intent of, retaliation.

The bill would authorize a civil action by an employee or other person who is the subject of an unfair immigration-related ~~practice, and practice.~~ *The bill would authorize a court to order the appropriate government agencies to suspend for 14 days the business license, as defined, of a person who violates these provisions for a first violation. The bill would require a court to order the appropriate government agencies to suspend for 30 or 90 days that license for a 2nd or 3rd violation, respectively, and to permanently revoke that license for a 4th*

~~violation or if the court establishes a pattern or practice of willful violations, as specified. The bill would authorize a person who prevails in an action pursuant to these provisions to recover reasonable attorney's fees and costs. certain business licenses held by the violating party for prescribed periods based on the number of violations. The bill would require the court to consider prescribed circumstances in determining whether a suspension of all licenses is appropriate.~~

Existing law prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Existing law further prohibits an employer from retaliating against an employee for that disclosure. Under existing law, a violation of these provisions by the employer is a misdemeanor. Existing law additionally subjects an employer that is a corporation or a limited liability company to a civil penalty not exceeding \$10,000 for each violation of these provisions.

~~This bill would additionally prohibit any person or entity acting on behalf of the employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and would prohibit any person or entity from retaliating against an employee for that disclosure. This from retaliating against an employee for such a disclosure. The bill would also expand the prohibited actions to include preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry. The bill would provide that any person or entity that violates these provisions is guilty of a misdemeanor, and would further subject an entity that violates these provisions that is a corporation or limited liability company to a civil penalty of not exceeding \$10,000 for each violation of these provisions. By expanding the scope of a crime, this bill would impose a state-mandated local program.~~

Existing law prohibits an employer or prospective employer, with the exception of certain financial institutions, from obtaining a consumer credit report, as defined, for employment purposes unless it is for a specified position, including, among others, a position in the state Department of Justice, a managerial position, as defined, or a position that involves regular access to \$10,000 or more of cash, as specified.

This bill would prohibit an employer from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. The Legislature finds and declares all of the
- 2 following:
- 3 (a) Wage theft is a serious and widespread problem that causes
- 4 severe hardship to low-wage workers, their families, and their
- 5 communities.
- 6 (b) When a worker is denied wages or forced to work “off the
- 7 clock,” there is an immediate and irreparable harm to the worker
- 8 and his or her family.
- 9 (c) Low-wage, often immigrant, workers are the most frequent
- 10 victims of wage theft and are also exposed to the greatest hazards
- 11 at work.
- 12 (d) Immigrant workers have the greatest number of work-related
- 13 injuries and fatalities.
- 14 (e) Far too often, when workers come forward to expose unfair,
- 15 unsafe, or illegal conditions, they face retaliation from the
- 16 employer.
- 17 (f) Where there are immigrant workers involved, employer
- 18 retaliation often involves threats to contact law enforcement
- 19 agencies, including immigration enforcement agencies, if a worker
- 20 engages in protected conduct.
- 21 (g) No employee should have to fear adverse action, whether it
- 22 involves threats to cut hours, move a worker to night shift, or
- 23 contact law enforcement agencies, simply for engaging in rights
- 24 the State of California has deemed so important that they are
- 25 protected by law.

1 (h) It is in the public policy interest of the State of California  
2 that workers be able to report concerns to their employers without  
3 fear of retaliation or discrimination.

4 (i) It is in the public policy interest of the State of California  
5 for workers to be willing to come forward to expose hazardous,  
6 unsafe, and unfair conditions at their worksites so that local, state,  
7 and federal agencies can effectively enforce the laws.

8 (j) It is essential to the enforcement of this state's labor laws  
9 that we have broad, clear, and effective protections for workers  
10 engaging in conduct protected by law from all forms of employer  
11 retaliation, including prohibiting immigration-related threats.

12 SEC. 2. Section 98.6 of the Labor Code is amended to read:

13 98.6. (a) A person ~~may~~ *shall* not discharge an employee or in  
14 any manner discriminate, retaliate, or take any adverse action  
15 against any employee or applicant for employment because the  
16 employee or applicant engaged in any conduct delineated in this  
17 chapter, including the conduct described in subdivision (k) of  
18 Section 96, and Chapter 5 (commencing with Section 1101) of  
19 Part 3 of Division 2, or because the employee or applicant for  
20 employment has filed a bona fide complaint or claim or instituted  
21 or caused to be instituted any proceeding under or relating to his  
22 or her ~~rights, which rights that~~ *rights that* are under the jurisdiction of the  
23 Labor Commissioner, ~~or made a written or oral complaint that he~~  
24 ~~or she is owed unpaid wages~~, or because the employee has initiated  
25 any action or notice pursuant to Section 2699, or has testified or  
26 is about to testify in a proceeding pursuant to that section, or  
27 because of the exercise by the employee or applicant for  
28 employment on behalf of himself, herself, or others of any rights  
29 afforded him or her.

30 (b) (1) Any employee who is discharged, threatened with  
31 discharge, demoted, suspended, retaliated against, subjected to an  
32 adverse action, or in any other manner discriminated against in  
33 the terms and conditions of his or her employment because the  
34 employee engaged in any conduct delineated in this chapter,  
35 including the conduct described in subdivision (k) of Section 96,  
36 and Chapter 5 (commencing with Section 1101) of Part 3 of  
37 Division 2, or because the employee has made a bona fide  
38 complaint or claim to the division pursuant to this part, or because  
39 the employee has initiated any action or notice pursuant to Section

1 2699 shall be entitled to reinstatement and reimbursement for lost  
2 wages and work benefits caused by those acts of the employer.

3 (2) An employer who willfully refuses to hire, promote, or  
4 otherwise restore an employee or former employee who has been  
5 determined to be eligible for rehiring or promotion by a grievance  
6 procedure, arbitration, or hearing authorized by law, is guilty of a  
7 misdemeanor.

8 (3) In addition to other remedies available, an employer who  
9 violates this section is liable for a civil penalty not exceeding ten  
10 thousand dollars (\$10,000) per employee for each violation of this  
11 section.

12 (4) In the enforcement of this section, there is no requirement  
13 that an individual exhaust administrative remedies or procedures.

14 (c) (1) Any applicant for employment who is refused  
15 employment, who is not selected for a training program leading  
16 to employment, or who in any other manner is discriminated  
17 against in the terms and conditions of any offer of employment  
18 because the applicant engaged in any conduct delineated in this  
19 chapter, including the conduct described in subdivision (k) of  
20 Section 96, and Chapter 5 (commencing with Section 1101) of  
21 Part 3 of Division 2, or because the applicant has made a bona fide  
22 complaint or claim to the division pursuant to this part, or because  
23 the employee has initiated any action or notice pursuant to Section  
24 2699 shall be entitled to employment and reimbursement for lost  
25 wages and work benefits caused by the acts of the prospective  
26 employer.

27 (2) This subdivision shall not be construed to invalidate any  
28 collective bargaining agreement that requires an applicant for a  
29 position that is subject to the collective bargaining agreement to  
30 sign a contract that protects either or both of the following as  
31 specified in subparagraphs (A) and (B), nor shall this subdivision  
32 be construed to invalidate any employer requirement of an  
33 applicant for a position that is not subject to a collective bargaining  
34 agreement to sign an employment contract that protects either or  
35 both of the following:

36 (A) An employer against any conduct that is actually in direct  
37 conflict with the essential enterprise-related interests of the  
38 employer and where breach of that contract would actually  
39 constitute a material and substantial disruption of the employer's  
40 operation.

1 (B) A firefighter against any disease that is presumed to arise  
2 in the course and scope of employment, by limiting his or her  
3 consumption of tobacco products on and off the job.

4 (d) The provisions of this section creating new actions or  
5 remedies that are effective on January 1, 2002, to employees or  
6 applicants for employment do not apply to any state or local law  
7 enforcement agency, any religious association or corporation  
8 specified in subdivision (d) of Section 12926 of the Government  
9 Code, except as provided in Section 12926.2 of the Government  
10 Code, or any person described in Section 1070 of the Evidence  
11 Code.

12 SEC. 3. Chapter 3.1 (commencing with Section 1019) is added  
13 to Part 3 of Division 2 of the Labor Code, to read:

14  
15 CHAPTER 3.1. UNFAIR IMMIGRATION-RELATED PRACTICES  
16

17 1019. (a) It shall be unlawful for an employer or any other  
18 person or entity to engage in, or to direct another person or entity  
19 to engage in, unfair immigration-related practices against any  
20 person for the purpose of, or with the intent of, retaliating against  
21 any person for exercising any right protected under this code or  
22 by any local ordinance applicable to employees. Exercising a right  
23 protected by this code or local ordinance includes, but is not limited  
24 to, the following:

25 (1) Filing a complaint or informing any person of an employer's  
26 or other party's alleged violation of this code or local ordinance,  
27 so long as the complaint or disclosure is made in good faith.

28 (2) Seeking information regarding whether an employer or other  
29 party is in compliance with this code or local ordinance.

30 (3) Informing a person of his or her potential rights and remedies  
31 under this code or local ordinance, and assisting him or her in  
32 asserting those rights.

33 (b) (1) As used in this chapter, "unfair immigration-related  
34 practice" means any of the following practices, when undertaken  
35 for the retaliatory purposes prohibited by subdivision (a):

36 (A) Requesting more or different documents than are required  
37 under Section 1324a(b) of Title 8 of the United States Code, or a  
38 refusal to honor documents tendered pursuant to that section that  
39 on their face reasonably appear to be genuine.

1 (B) Using the federal E-Verify system to check the employment  
2 authorization status of a person at a time or in a manner not  
3 required under Section 1324a(b) of Title 8 of the United States  
4 Code, or not authorized under any memorandum of understanding  
5 governing the use of the federal E-Verify system.

6 (C) Threatening to file or the filing of a false police report.

7 (D) Threatening to contact or contacting immigration authorities.

8 (2) “Unfair immigration-related practice” does not include  
9 conduct undertaken at the express and specific direction or request  
10 of the federal government.

11 (c) Engaging in an unfair immigration-related practice against  
12 a person within 90 days of the person’s exercise of rights protected  
13 under this code or local ordinance applicable to employees shall  
14 raise a rebuttable presumption of having done so in retaliation for  
15 the exercise of those rights.

16 (d) (1) An employee or other person who is the subject of an  
17 unfair immigration-related practice prohibited by this section, or  
18 a representative of that employee or person, may bring a civil  
19 action for equitable relief and any damages or penalties, in  
20 accordance with this section.

21 (2) Upon a finding by a court of applicable jurisdiction of a  
22 violation this section:

23 (A) For a first violation, the court ~~may, in the court’s~~ *its*  
24 discretion, *may* order the appropriate government agencies to  
25 suspend all licenses subject to this chapter that are held by the  
26 violating party for a period of *up to* 14 days. For the purposes of  
27 this paragraph, the licenses that are subject to suspension are all  
28 licenses held by the violating party specific to the business location  
29 or locations where the unfair immigration-related practice occurred.  
30 ~~If the violating party does not hold a license specific to the business~~  
31 ~~location or locations where the unfair immigration-related practice~~  
32 ~~occurred, but a license is necessary to operate the violating party’s~~  
33 ~~business in general, the licenses that are subject to suspension~~  
34 ~~under this subdivision are all licenses that are held by the violating~~  
35 ~~party at the violating party’s primary place of business. In~~  
36 ~~determining whether a suspension of all licenses is appropriate,~~  
37 ~~the court shall consider whether the employer knowingly committed~~  
38 ~~an unfair immigration practice, the good faith efforts of the~~  
39 ~~employer to resolve any alleged unfair immigration related practice~~  
40 ~~after receiving notice of the violations, as well as the harm other~~



employees of the employer will suffer as a result of the suspension of all licenses. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order.

(B) For a second violation, the court ~~shall, in its discretion, may~~ order the appropriate government agencies to suspend ~~for a period of 30 days~~ all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. ~~If the violating party does not hold a license specific to the business location or locations where the unfair immigration-related practice occurred, but a license is necessary to operate the violating party's business in general, the court shall order the appropriate agencies to suspend for a period of 30 days all licenses that are held by the violating party at the violating party's primary place of business.~~ *occurred, for a period of up to 30 days. In determining whether a suspension of all licenses is appropriate, the court shall consider whether the employer knowingly committed an unfair immigration practice, the good faith efforts of the employer to resolve any alleged unfair immigration related practice after receiving notice of the violations, as well as the harm other employees of the employer will suffer as a result of the suspension of all licenses.* On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall immediately suspend the licenses.

(C) For a third violation, ~~or any violation thereafter,~~ the court ~~shall, in its discretion, may~~ order the appropriate government agencies to suspend for a period of *up to* 90 days all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. ~~If the violating party does not hold a license specific to the business location or locations where the unfair immigration-related practice occurred, but a license is necessary to operate the violating party's business in general, the court shall order the appropriate agencies to suspend for a period of 90 days all licenses that are held by the violating party at the violating party's primary place of business.~~ *In determining whether a suspension of all licenses is appropriate, the court shall consider whether the employer knowingly committed an unfair immigration practice, the good faith efforts of the employer to resolve any alleged unfair immigration related practice after receiving notice of the violations, as well as the harm other*

1 *employees of the employer will suffer as a result of the suspension*  
2 *of all licenses. On receipt of the court's order and notwithstanding*  
3 *any other law, the appropriate agencies shall immediately suspend*  
4 *the licenses.*

5 ~~(D) For a fourth violation, or if the court establishes a pattern~~  
6 ~~or practice of willful violations, the court shall order the appropriate~~  
7 ~~government agencies to permanently revoke all licenses that are~~  
8 ~~held by the violating party specific to the business location or~~  
9 ~~locations where the unfair immigration-related practice occurred.~~  
10 ~~If the violating party does not hold a license specific to the business~~  
11 ~~location or locations where the unfair immigration-related practice~~  
12 ~~occurred, but a license is necessary to operate the violating party's~~  
13 ~~business in general, the court shall order the appropriate agencies~~  
14 ~~to permanently revoke all licenses that are held by the violating~~  
15 ~~party at the violating party's primary place of business. On receipt~~  
16 ~~of the court's order and notwithstanding any other law, the~~  
17 ~~appropriate agencies shall immediately revoke the licenses.~~

18 (3) An employee or other person who is the subject of an unfair  
19 immigration-document practice prohibited by this section, and  
20 who prevails in an action authorized by this section, shall recover  
21 its reasonable attorney's fees and costs, including any expert  
22 witness costs.

23 (e) ~~(1) As used in this chapter, "license"~~ *As used in this chapter:*

24 (1) *"License" means any agency permit, certificate, approval,*  
25 *registration, charter, or similar form of authorization or charter*  
26 *that is required by law and that is issued by any agency for the*  
27 *purposes of operating a business in this state, including any of the*  
28 *following: state. "License" does not include a professional license.*

29 ~~(A) Articles of incorporation.~~

30 ~~(B) Certificate of partnership, partnership registration, or articles~~  
31 ~~of organization.~~

32 ~~(C) Transaction privilege tax license.~~

33 ~~(2) As used in this chapter, "license" does not include a~~  
34 ~~professional license.~~

35 (2) *"Violation" means each incident when an unfair immigration*  
36 *practice was committed, without reference to the number of*  
37 *employees involved in the incident.*

38 1019.1. The provisions of this chapter are severable. If any  
39 provision of this chapter or its application is held invalid, that

1 invalidity shall not affect other provisions or applications that can  
2 be given effect without the invalid provision or application.

3 SEC. 4. Section 1024.6 is added to the Labor Code, to read:

4 1024.6. An employer may not discharge an employee or in any  
5 manner discriminate, retaliate, or take any adverse action against  
6 an employee because the employee updates or attempts to update  
7 his or her personal information, unless the changes are directly  
8 related to the skill set, qualifications, or knowledge required for  
9 the job.

10 SEC. 5. Section 1102.5 of the Labor Code is amended to read:

11 1102.5. (a) ~~An employer or any other person or entity may~~  
12 *employer, or any person acting on behalf of the employer, shall*  
13 not make, adopt, or enforce any rule, regulation, or policy  
14 preventing an employee from disclosing information to a  
15 government or law enforcement agency, *or for providing*  
16 *information to, or testifying before, any public body conducting*  
17 *an investigation, hearing, or inquiry*, where the employee has  
18 reasonable cause to believe that the information discloses a  
19 violation of state or federal statute, or a violation or noncompliance  
20 with a state or federal rule or regulation.

21 (b) ~~An employer or any other person or entity may employer,~~  
22 *or any person acting on behalf of the employer, shall* not retaliate  
23 against an employee for disclosing information to a government  
24 or law enforcement agency, *or for providing information to, or*  
25 *testifying before, any public body conducting an investigation,*  
26 *hearing, or inquiry*, where the employee has reasonable cause to  
27 believe that the information discloses a violation of state or federal  
28 statute, or a violation or noncompliance with a state or federal rule  
29 or regulation.

30 (c) ~~An employer or any other person or entity may employer,~~  
31 *or any person acting on behalf of the employer, shall* not retaliate  
32 against an employee for refusing to participate in an activity that  
33 would result in a violation of state or federal statute, or a violation  
34 or noncompliance with a state or federal rule or regulation.

35 (d) ~~An employer or any other person or entity may employer,~~  
36 *or any person acting on behalf of the employer, shall* not retaliate  
37 against an employee for having exercised his or her rights under  
38 subdivision (a), (b), or (c) in any former employment.

1 (e) A report made by an employee of a government agency to  
2 his or her employer is a disclosure of information to a government  
3 or law enforcement agency pursuant to subdivisions (a) and (b).

4 (f) In addition to other penalties, an employer ~~or other entity~~  
5 that is a corporation or limited liability company is liable for a  
6 civil penalty not exceeding ten thousand dollars (\$10,000) for each  
7 violation of this section.

8 (g) This section does not apply to rules, regulations, or policies  
9 ~~which~~ *that* implement, or to actions by employers against  
10 employees who violate, the confidentiality of the lawyer-client  
11 privilege of Article 3 (commencing with Section ~~950~~), 950) *of, or*  
12 the physician-patient privilege of Article 6 (commencing with  
13 Section 990) ~~of of~~, Chapter 4 of Division 8 of the Evidence Code,  
14 or trade secret information.

15 SEC. 6. Section 1103 of the Labor Code is amended to read:

16 1103. An employer or any other person or entity that violates  
17 this chapter is guilty of a misdemeanor punishable, in the case of  
18 an individual, by imprisonment in the county jail not to exceed  
19 one year or a fine not to exceed one thousand dollars (\$1,000) or  
20 both that fine and imprisonment, or, in the case of a corporation,  
21 by a fine not to exceed five thousand dollars (\$5,000).

22 SEC. 7. No reimbursement is required by this act pursuant to  
23 Section 6 of Article XIII B of the California Constitution because  
24 the only costs that may be incurred by a local agency or school  
25 district will be incurred because this act creates a new crime or  
26 infraction, eliminates a crime or infraction, or changes the penalty  
27 for a crime or infraction, within the meaning of Section 17556 of  
28 the Government Code, or changes the definition of a crime within  
29 the meaning of Section 6 of Article XIII B of the California  
30 Constitution.